1 **REPORTABLE**

IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL - DURBAN

CASE NO. 15531/2008

In the matter between:

AHMED SADECK GOOLAM SEEDAT N.O.	**FIRST APPLICANT**
GOOLAM HOOSEN MAHOMED SEEDAT N.O.	**SECOND APPLICANT**
EUNISE GOOLAN HOOSEN SEEDAT N.O.	**THIRD APPLICANT**

and

GAPSTYLE INVESTMENTS (PTY) LTD	**RESPONDENT**
THE NATIONAL TEXTILE BARGAINING COUNCIL	**INTERVENING PARTY**

JUDGMENT

SISHI J:

[1] This is an opposed application for the provisional winding-up of the Respondent company, in terms of section 346 of the Companies Act 61 of 1973, as amended (the Act). The Applicant alleges that the Respondent is unable to pay its debts as envisaged in section 345(1)(a)(i) of the Act. The Respondent is not opposing the application. The application is, however,

opposed by the intervening party. The intervening party was granted leave by this Court to intervene and all the affidavits by the parties have been filed.

[2] A feature of the application is that it is based on the deeming provisions of section 345(1)(a)(i) of the Act, namely, the delivery of a registered notice demanding payment following which payment is not made within three weeks because the company neglected to make such payment. The Applicant which is the creditor has based its claim on the fact that rentals had not been paid and flowing from such non-payment the demand to the registered office was made. The Applicant contends that this is the kind of case where a winding-up order is appropriate.

[3] The First Applicant along with the Second and Third Applicants are trustees of the Classique Property Trust (IT 1800/00). They are bringing these proceedings on behalf of the Trust.

[4] The Respondent is Gapstyle Investments (Pty) Ltd, a company with limited liability having its registered office at 2nd Floor, Lornegrey Medical Centre, 280 Grey Street, Durban.

[5] The intervening Respondent is the National Textile Bargaining Council which was granted leave to intervene in this application by an order of Court dated 28 November 2008.

[6] The facts of this case are briefly as follows:

The Respondent is indebted to the Applicant in the sum of R230 000,00, being in respect of payment due, owing, and payable for rental between the periods November 2006 and September 2008 in terms of a written lease agreement entered into between the Respondent and the Trust, both having been duly represented at the time of the contract came into being. In attempting to seek payment of the said amount due, the Trust had, through its Attorneys forwarded a letter dated 12 September 2008 wherein the Respondent was given notice in terms of section 32 of the Magistrate's Court Act as well as notice in terms of section 345(1)(a)(i) of the Companies Act. The Respondent had not made payment as demanded after the expiry of twenty one days.

[7] Subsequent thereto it came to the knowledge of the Trustees of the Trust that the National Textile Bargaining Council, the intervening party herein, had taken judgment against the Respondent.

[8] The Trust Attorneys were immediately contacted, who forwarded a letter dated 15 October 2008 to the Respondent. The Trust Attorneys had simultaneously caused to be issued out of the Magistrate's Court, Durban, an application in terms of the provisions of section 32 of the Magistrate's Act for the granting of an order attaching the movable assets of the Respondent. The Trust had also caused to be issued an action in the Magistrate's Court, Durban for the recovery of the rentals due, owing and payable.

[9] From the facts set out in the papers, it is either common cause or not in disputed that the Respondent has a judgment granted against it and that the judgment in favour of the intervening party has not been met. The Applicant has no security for its claim in the light of the fact that the sheriff of the Magistrate's Court was not able to give effect to an attachment of the goods forming part of the landlord's hypothec in furtherance of a section 32 application, in the Magistrate's Court for the grant of an order attaching Respondent's movables. The letter of demand under section 345(1)(a)(i) of the Act was sent to the offices of the Accounting officer of the Respondent on 12 September 2008. The debt claimed has not been paid to date.

[10] Mr Mahomed for the Applicant argued that the Applicant seeks a provisional winding-up of the Respondent on the grounds that the Respondent is indebted to the Applicant in the sum not less than R200,00, and is unable to pay its debts in terms of the provision of section 345 read with section 344 of

the Act. Mr Mahomed submitted that in order for a debt to be held to be due in terms of the provisions of the Insolvency Act, such debt must be admitted or its monetary value must be readily ascertainable. The Respondent has not disputed the demand or the debt due in respect of the rental. The intervening party has made many allegations yet cannot gainsay the fact that the rentals charged were not due or that the Respondent is in any event not liable for the rentals of at least R200,00, which would render the relevant provisions of the Act operative. He submitted that for the purposes of the insolvency enquiry at this stage, all that the Applicant needs to show is that there is an amount of more than R100,00, that is due, owing and payable and that upon demand that amount has not been paid. He submitted that for all intent purposes, even if one considers the fact that irrespective of the fact that there is a period of time that the rental was not demanded by the Applicant as the intervening party has suggested, even on the last month arrear, if one is to merely take into account that instalment alone which was not paid, that alone forms in this instance a ***prima facie*** case for the grant of the provisional order. Mr Mahomed referred to the following cases:

Gatx-Fuller v Shepherd & Shepherd Inc 1984(3) SA 48 (W);

Barclays Bank And Another v Riverside Dried Fruit Co. (Pty) Ltd 1949 (1) SA 937 (C);

Taylor & Steyn NNO v Koekemoer 1982 (1) SA 374 (T);

Alton Coach Africa CC v Datcentre Motors (Pty) Ltd T/A CMH Commercial 2007(6) SA 154 (D).

[11] In ***Gatx-Fuller v Shepherd & Shepherd Incorporation, supra***, the Court held that all that the Applicant is required to show is that the creditor has a

claim of R100,00, or more, then due. The words "then due" means "then due and payable". The case of ***Barclays Bank And Another v Riverside Dried Fruit Co. (Pty) Ltd, supra***, was cited with approval in this case. In ***Taylor & Steyn NNO v Koekemoer, supra,*** Mago J held that the ***concursus creditorum*** is aimed at ensuring that the recovery of company's assets and applying them to the payment of its debts in the prescribed order of preference. (See section 391 of the Act). Mr Mahomed submitted, correctly in my view, that the implication is that, there are more than one creditors and where one creditor brings forth a claim, the Court has to consider especially in this case what is to be the benefit to the general body of the creditors. In the present case, the intervening party has a judgment against the Respondent and they also have a writ. They have not yet executed on their writ but they still have a writ. The Applicant is just merely one of the creditors in this case and there may be more creditors.

[12] It is important to emphasise in this matter that the Respondent is not opposing the application for the winding-up. It cannot be to the benefit of the general body of creditors if one creditor is preferred against others and, in this instance, if the Court were not to grant a provisional order, it would be condoning a preference to the intervening party who is already vested and armed with the judgment of the Labour Court.

[13] In ***Alton Coach Africa CC v Datcentre Motors trading as CMH Commercial, supra,*** Ndlovu J accepted and approved the principles set out in the case of ***Gatx – Fuller v Shepherd & Shepherd Inc supra***. I agree with the findings and principles set out in these cases.

[14] In the present matter, the Respondent owes the Applicant an amount of R230 000,00, for rental, which is due and payable. The Respondent has not made payment as demanded after the expiry of the twenty one days. The Respondent has not opposed the winding-up application and therefore has not disputed the amount owing, the course of action and that the rental is due and payable. It is therefore clear from the papers and the argument advanced that the Respondent is indebted to the Applicant in the sum of more than R200,00, and is thus unable to pay its debts in terms of the provisions of section 345 read with section 344 of the Companies Act.

[15] One of the grounds advanced by the intervening party in resisting this application, is that the Application is based upon a deemed inability of the Respondent to pay its debts because it does not pay the amount set out in a demand allegedly sent in terms of section 345(1)(a)(i) of the Act. It was submitted on behalf of the intervening party that there is something peculiar in relation to the service of the demand at the registered office of the debtor and, it is clear from the Application papers that the service that is alleged to have taken place did not take place at the registered office. As a matter of law, the

deeming provisions of section 345(1)(a)(i) do not come into play and no cause of action is set out in the application which is in fact defective. It is common cause that the annexure attached to page 17 of the papers, does not reflect that the section 345 demand was made at the registered office of the Respondent. However, there is a supplementary affidavit on the papers, rectifying the said defect. Counsel for the intervening party has argued that the Applicant did not bring an application for leave to supplement those papers, it merely attempted to hand up a supplementary affidavit to try and cure the defect. When the Court asked Counsel for the intervening party, whether at the first hearing of the matter the Applicant handed up an affidavit or filed a supplementary affidavit as Mr Mahomed submitted, he replied that it appeared that "the Applicant just filed in due cause", it was never given leave to do so and in terms of the rules, it ought not to have done so. He submitted that what should have happened in the application is that the application should have been dismissed and the Applicant should have brought a complete and a proper set of papers. He submitted that if they were given leave to supplement the papers which, the Court certainly has the discretion to do, it would have been reflected in the court order. He submitted that on the day in question, the intervening Respondent was given leave to intervene and the matter was adjourned ***sine die***. He submitted that the supplementary affidavit is not properly before Court, it certainly will have implications on the costs should the Court be prepared to grant leave and take heed to the allegations contained in that supplementary affidavit. The Applicant cannot just merely file the supplementary affidavit and claim that it is part of the papers. It is for these reasons that the intervening party did not deal with it in

its answering affidavit. No leave of court was granted and the supplementary affidavit is improperly part of the papers before court.

Mr Mahomed for the Applicant submitted that he was present in Court, so was Counsel for the intervening party when the matter stood down before Moodley AJ, and he indicated to her that a supplementary affidavit was on its way to Court to explain the fact that the wrong annexure was put up, and later, that affidavit was handed up in Court. The matter then proceeded in the afternoon and was enrolled for the next morning, when in fact an order for the intervention was granted. Clearly the affidavit was properly before Court, it was handed up in Court and accepted by the Court.

[16] The supplementary affidavit on the papers does not bear the Registrar's stamp to indicate the date on which it was filed, if it is correct that it was filed in late in due course, as Counsel for the intervening party contended, it would bear the Registrar's date stamp. If it was handed up in Court, it would have no Registrar's stamp. It is therefore probable, as Mr Mohamed contended that this supplementary affidavit was handed up in Court, on the day the intervening party was granted leave to intervene. If it was handed up in Court and was accepted by the Court, it is properly before Court. Counsel for the intervening party has not suggested that they were not served or given a copy of the said affidavit. He submitted that they did not deal with it in their answering affidavit, simply because it was not properly before Court. In my

view, the intervening party did not deal with the supplementary affidavit in its answering affidavit at its own peril. At any rate the court has discretion to accept the supplementary affidavit even at this stage and consider its content as it was timeously served on the intervening party. It is clear from the letter dated 12 September 2008, that it was served at the registered office of the company and accepted by Ishmael Thaipan Incorporated Chartered Accountants. Acknowledgment of receipt of the letter is clearly indicated on the last page of this letter, and it reflects the same date 12 September 2008. The Court is therefore entitled to have regard to the contents of this affidavit. The submission on behalf of the intervening party that the original papers as they stand are defective and that the application should be dismissed for that reason alone, is entirely unfounded.

[17] Counsel for the intervening party also argued that the provisional winding-up of the Respondent ought not to be granted as the application is not ***bona fide***, and is designed to frustrate the intervening Respondent from recovering monies owed to it by the Respondent. Counsel for the intervening party submitted that there are essentially two separate points in this regard. The first is whether the Applicant is a ***bona fide*** creditor of the Respondent. He submitted that this is a very peculiar behaviour in relation to the allegations of the creditor. He submitted that it is improbable that after not requiring the Respondent to pay rent for one and a half years, the Applicant suddenly decided to move with urgency, to liquidate the Respondent on the basis that it had not paid rent on an alleged twenty one day demand. The Applicant

alleges to be the landlord of the Respondent, and has been so for a year and a half, yet puts up no proof or allegation proving that any rent was ever paid, and then just after judgment had been granted in favour of the intervening Respondent, suddenly moves with urgency, serves a demand, gives them twenty one days to pay, and then brings the liquidation application. This is an indication of lack of ***bona fides*** of the Applicants in the matter. In this regard, Mr Mahomed has correctly pointed out that it must be borne in mind that the Applicants have issued summons and attempted to effect security for its claim in terms of the section 32 interdict in the Magistrate's Court but without success. This allegation is groundless and falls to be rejected.

[18] A further point raised by the intervening party is that, there exists a business relationship between a company by the name of Classique Quilters CC and the Respondent, in terms of which the Close Corporation receives the orders for goods and it, in turn, contracts the Respondent to manufacture the goods.

[19] It is further contended that, on the information received from the Industrial Council for the clothing industry, the First, Second, and Third Applicants are described as directors of Classique Quilters CC. This relationship should have been disclosed in the liquidation application. Furthermore, the intervening party draws to the attention of the Court the fact that the surnames of the trustees and the surnames of the directors of the Respondent are the same. Accordingly, this is something which should have been dealt with, and

if there is a family connection as it seems probable, this should have been disclosed. Applicants have alleged that there are so many Seedat's in Durban, and that there is no collusion. Certainly, they have not admitted the family relationship between them and the directors of the Respondent. On these grounds, it cannot therefore be concluded that there is no ***bona fides*** in this application and that it is designed to frustrate the intervening Respondent from receiving monies owed to it by the Respondent. This submission has no merit. Counsel for the intervening party submitted that it is probable that there is collusion between the parties. This contention is merely based on speculation and there is no evidence on the papers that suggest that there is in fact collusion between them. This contention is unfounded and is accordingly rejected.

[20] In ***Kalil v Decotex (Pty) Ltd and Another 1988(1) SA 943 AD 978 D-F***, the Court stated the following:

"This judgment, ***(Provincial Building Society of South Africa, v Du Bois 1966(3) SA 76 (W))*** would thus appear to lay down that in an opposed application for a provisional order of sequestration, the necessary ***prima facie*** case is established only when the Applicant can show that on a consideration of all the affidavits filed, a case for sequestration has been established on a balance of probabilities, and that, where the Applicant does show this, an application by the Respondent for the matter to be referred to ***viva voce*** evidence (in order to endeavour to disturb this balance) will, save in exceptional circumstances not be granted." The Court went on at ***979 B-C*** to

state that where on affidavits there is a ***prima facie*** case (that is "a balance of probabilities") in favour of the Applicant, then, in my view, a provisional order of winding-up of the Respondent should normally be granted and, save in exceptional circumstances, the Court should not accede to an application by the Respondent that the matter be referred to the hearing of ***viva voce*** evidence.

See also ***Van Zyl NO. v Look Good Clothing CC 1996(3) SA 523 (SE).***

[21] Considering all the material properly place before me, I am satisfied that there is a ***prima facie*** case "i.e. a balance of probabilities" in favour of the Applicant and there is no reason why a provisional order for the winding-up of the Respondent should not be granted in this matter. I am satisfied that the grounds upon which the intervening party is resisting this application have no substance. As correctly contended on behalf of the Applicant, the grant of the relief sought would be to the benefit of the general body of creditors, whereas the refusal of the grant of the relief will only benefit the intervening party to the detriment of the general body of creditors.

[22] In the circumstances, there is no reason why the Respondent should not be provisionally wound-up as prayed.

The costs of opposing the application will follow the result.

[23] In the result I make the following order:

1. An order is granted in terms of paragraphs 1, 2, 3 and 4 of the Notice of Motion.
2. The return date in paragraph 1 is, 15 January 2010;
3. This order shall be published on or before 12 December 2009;
4. The intervening party is ordered to pay the costs of opposing the application.

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SISHI J

Date of Hearing	:	26 June 2009
Date of Judgment	:	13 November 2009
Applicant's Attorneys	:	G H Ismail & Associates 543 Ridge Road Overport **DURBAN** Tel: (031) 2078180 Ref: Mr Hussain/CK/C348
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